

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RFA No.2527 of 1990
Reserved on: 09.01.2020
Pronounced on : 11.02.2020

Rohtan (since deceased) through his L.Rs.

... Appellants

Versus

Mangal (since deceased) through his L.Rs. and others

... Respondents

CORAM : HON'BLE MR.JUSTICE G.S. SANDHAWALIA

Present : Mr. Jagat Singh, Advocate and
Mr. S.K. Panwar, Advocate for the appellants.

Mr. H.N. Mehtani, Advocate
for L.Rs. of respondent No.1.

Mr. R.D. Yadav, Advocate
for L.Rs. of respondent No.2.

G.S. Sandhawalia, J.

The present appeal by the appellant-petitioner arises of the judgment dated 06.11.1990 passed by the Reference Court, Bhiwani, whereby the petition under 30 of the Land Acquisition Act, 1894 (for short '1894 Act') was dismissed.

2. Resultantly, the claim of the appellant-petitioner for compensation to the extent of 6/16th share (3/8th) for the land measuring 79 kanals 7 marlas belonging to Bhagha @ Bagh Singh son of Jhabbu, falling in the revenue estate of village Lohar Bhiwani, Hadbast No.22, Tehsil & District Bhiwani and which had been acquired vide Award No.17 dated 31.03.1988. Compensation of same was claimed on account of the fact that Bhagha @ Bagh Singh brother of the petitioner had been

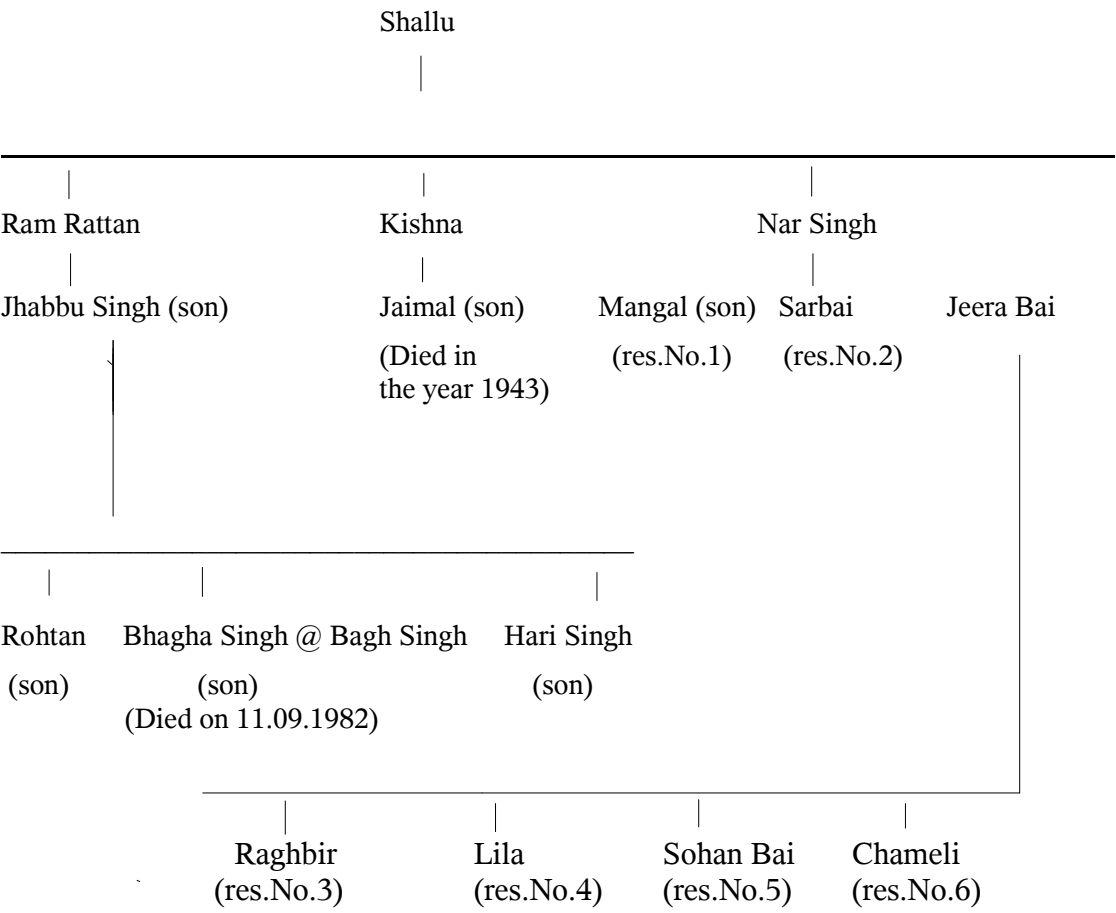
appointed heir of the property of Jaimal was denied.

3. The Reference Court rejected the said claim on the ground that Jaimal never adopted Bhagha @ Bagh Singh. There was no evidence to show that there was any adoption ceremony and only the allegation was that *Gur* had been distributed. It was noticed that Bhagha @ Bagh Singh deceased was residing with Rohtan the present appellant and their *Khata* was joint and they had a common ration card (Ex.PA). Reliance was placed upon para 55 of the Digest of the Customary Law to reject the claim of being appointed heir on the ground that he would not succeed collectively to the appointer's relatives. The judgment passed in '**Kartar Singh Vs. Surjan Singh**' 1975 Current Law Journal was discussed that there were observations that an appointed heir could not succeed to the collaterals of the persons who appointed him as his heir, whereas adopted son would succeed to the collaterals of the adoptive father and, thus, was distinguished.

4. A finding was recorded since the adoption of Bhagha @ Bagh Singh by Jaimal was not proved and that he was an appointed heir and thus he succeeded to the property of Jaimal and according to that he was shown as an adopted son of Jaimal in the revenue records. Bhagha @ Bagh Singh having died unmarried as well as issueless, the property which Bhagha @ Bagh Singh inherited from Jaimal was not to go to his brother, but it would go to the collaterals of Jaimal, who were the respondents before the Reference Court and are the respondents herein and they being the legal representatives namely children of Nar Singh

who was the uncle of Jaimal.

5. In order to appreciate the controversy as such the pedigree of the parties is to be taken into consideration, which is as under:-



6. Thus, the questions which would arise are that Bhagha @ Bagh Singh who himself was issueless, having been appointed as the heir of Jaimal and who had died in the year 1943 would inherit the property absolutely or whether it would revert to the collaterals of Jaimal on the death of Bhagha @ Bagh Singh on 11.09.1982. Secondly whether the appellant Rohtan would, thus, be entitled for preferential right of succession under Section 8 (b) of the Hindu Succession Act, 1956 (for short '1956 Act') being the brother and a Class-II heir of Bhagha the appointed heir under Custom.

7. A perusal of petition under Section 30 of the 1894 Act filed

by the appellant would go on to show that the land was acquired vide Award dated 31.03.1988 for the public purpose for development of Sector 23 in Bhiwani by the Haryana Urban Development Authority (HUDA). The payment of compensation being in dispute the petition under Section 30 was filed. The amount of ₹2,97,901/- had been deposited with the Civil Court by the Land Acquisition Collector.

8. The challenge had been raised that respondent No.1 namely Mangal had got sanctioned Mutation No.8800 in respect of 6/16th share of land in dispute in their favour, which was illegal, null and void. The respondents had no right to take the compensation in respect to the disputed share. The claim was made on account of the fact that Bhagha @ Bagh Singh was the real brother of the petitioner, who was the preferential heir. The family members were Rajput by caste and were agriculturist and were governed by Punjab Customary Law in the matters of adoption, inheritance and appointment of heir to the property. Jaimal had never adopted Bhagha @ Bagh Singh and appointed him as his lawful heir and after his death property passed to Bhagha @ Bagh Singh who had always been considered as son of Jhabbu and he never claimed or represented himself to be the adopted son of Jaimal and after his death would pass to the petitioner, who was his real brother. The possession of the entire land always remained with the petitioner and it never was with the respondents, who were not related to deceased Bhagha @ Bagh Singh and they had no right to succeed to the property, as per the above said mutation.

9. The stand of respondent No.1 was that Bhagha @ Bagh Singh was adopted son of Jaimal son of Kishna son of Shallu. Resultantly, claim was made that they were the only heirs and co-sharers would be Mangal etc. children of Nar Singh. The mutation as such in their favour was stated to be correct and it was pointed out that a dispute had been raised at the time of mutation which had been decided against the petitioner on 16.12.1985 by the Assistant Collector Grade-I, Bhiwani. The appeal had been dismissed on 03.03.1986 (Ex. R-3) by the Collector, Bhiwani. It was further averred that the Assistant Collector on 15.07.1985 in a disputed mutation case, had come to the finding that Bhagha @ Bagh Singh was the adopted son. The factum of the parties being Rajput by caste was admitted and it was stressed that adoption of Bhagha @ Bagh Singh by Jaimal was binding. Resultantly, it was prayed that Mangal (son), Sarbai and Jeera Bai (daughters) of Nar Singh may be held to be the successors of the property left behind by Bhagha @ Bagh Singh.

10. The plea taken by respondents No.3 & 4 sons of Jeera Bai daughter of Nar Singh was that Jaimal had no issue and he never adopted Bhagha @ Bagh Singh to be his son. The said respondents claimed on account of being the sons of Jadia @ Jeera Bai. The entry in the revenue record was against the legal rights and liable to be set aside. Allegations were raised against respondent No.1 Mangal that he used to say that he will never take the share of Jadia and pay her the due share.

11. In the reply filed by Sohan Bai & Chameli daughters of Jadia

@ Jeera Bai, the plea was taken that Bhagha @ Bagh Singh was the adopted son and the mutation was justified. It was held out that the petitioner was not closest co-sharer of Bhagha @ Bagh Singh and, therefore, he was not entitled to receive the compensation. The compensation was to go to the heir of Nar Singh as the deceased Bhagha @ Bagh Singh being adopted son and not the son of Jhabbu. The factum of parties being Rajput by caste was admitted.

12. In the replication stand taken by the appellant-petitioner was reiterating the stand taken in the petition under Section 30.

13. A perusal of the evidence which was led would go on to show that the appellant-petitioner Rohtan had appeared as PW-1 and had stated that Bhagha was never adopted by Jaimal and at the time of adoption among the Rajput there was a custom regarding adopting a child, the sweets in the form of *Gur, Shakkar or Ladoo* used to be distributed, but Jaimal did not perform any such ceremony. In the cross-examination, it had come on record that Bhagha had got two houses, one of which was inherited from Jaimal and it was sold by him. Bhagha had shown himself as son of Jhabbu in the civil proceedings (Ex.P9 and Ex.P10).

14. PW-2 Phul Singh aged 80 years stated that he did not know whether Jaimal had adopted Bhagha as his son or not, but at the time of his death Jaimal told that he had given his whole of land to Bhagha because he used to serve him. In the cross-examination he stated that Jaimal used to say that whosoever will serve him, will inherit his property

and in cross-examination it was further elicited that Bhagha used to reside in the house of Jaimal with him and used to serve him.

15. PW-3 Gorkha also stated that Jhabbu did not give his son to Jaimal. On account of the custom, if some proprietor died issueless then whosoever served him would inherit his property and on such account Bhagha inherited the property of Jaimal. On death of Bhagha, Rohtan being the brother inherited the property and Mangal had no concern with the property. In cross-examination he stated that there was no custom of executing a Will and Jaimal had given his property to Bhagha only. He denied the suggestion that Mangal etc. were successors of the property of Bhagha.

16. In defence, Mangal appeared as RW-1 to take the stand that Bhagha was the adopted son of Jaimal who had died 45 years back from 1990. It was his case that Bhagha was adopted in his presence and *Gur* was distributed at the time of adoption. Bhagha used to address Jaimal as father. Jhabbu had died first and then Jaimal and the custom of adoption was familiar. He had admitted that he had two sisters Sarvai and Daria and Daria had two sons, who were at par with them in inheritance of Bhagha's property. In cross-examination he admitted that there was eight *Pannas* in Bhiwani Lohar and there was a custom that if any proprietor died issueless and whosoever served him, would get the property of that person. Similarly, Bhagha had got the property of Jaimal. He also admitted that Bhagha's property had been inherited by Rohtan. He denied the suggestion that Jaimal never adopted Bhagha and there was no

adoption custom in their *Panna*.

17. RW-2 Ram Kumar also deposed on the same lines that there was an adoption by Jaimal and he was on visiting terms with Mangal, Rohtan and Bhagha. Jaimal and Bhagha both used to treat each other in this relation as father and son. He stated that Jhabbu had died prior to Jaimal. Jaimal adopted Bhagha 3-4 years prior to his death and he used to reside with Jaimal and used to serve him and inherited his property. He admitted that no adoption ceremony was performed nor any adoption deed was written in his presence.

18. RW-3 Mohar Singh admitted that Bhagha used to reside with Jaimal and used to serve him and took the plea that he was adopted by Jaimal, who was his uncle (Tau). In cross-examination, he admitted that no adoption deed was executed in his presence. However, *Patargas and Bhaili* were distributed when the adoption took place which was prior to partition. Jaimal was married, but his wife had died. He did not remember the time, day and year of adoption. Bhagha used to reside separately, but 2-3 years before the death of Jaimal, he used to reside with him. He also stated that there was a separate custom of *Pannas* and the people were agriculturist as well as servicemen.

19. RW-4 Leela son of Jaria daughter of Nar Singh, claimed 1/3rd share in the property of Jaimal and stated that Jaimal's property was inherited by Bhagha, in lieu of services rendered to Jaimal. In cross-examination, he admitted that Bhagha used to address Jaimal as his uncle (Tau). Bhagha used to address Jhabbu as father. He further stated that he

was never adopted by Jaimal. He further admitted that Rohtan was the real brother of Bhagha and was entitled to the whole property being his brother.

20. Smt. Sohan Bai daughter of Jadia @ Jeera Bai daughter of Nar Singh appeared as RW-5. In cross-examination she stated that Bhagha was adopted by Jaimal and denied the suggestion that it was not done and stated that she did not claim any compensation regarding the disputed land. She wanted that share to go to her maternal uncle Mangal.

21. From the pleadings and evidence, it would be clear that the stand of the appellants is based on the custom as such of appointment being an legal heir and by stupendously avoiding that there was any adoption to take the benefit and advantage of the property in hands of Bhagha, which he had inherited from Jaimal, so that the property would come back to Rohtan under the 1956 Act. The petitioner-appellant being well aware that if adoption as such was pleaded on the death of Bhagha, the property would revert to the collaterals, on account of no Will left by the deceased and the property would have to evenly distributed. It was in such circumstances, the plea of adoption was taken by the respondent No.1 to get a share in the property, which would divest the heirs of the adopted son of his property on account of his death.

22. From the record it is clear that vide mutation No.3264 on 30.03.1945 (Ex.R4), the property of Jaimal was mutated in favour of Bhagha. On account of Bhagha's death on 11.09.1982, the mutation was entered in favour of children of Nar Singh, vide entry No.8800 which was

contested and an order was passed on 16.07.1985 (Ex.R2) by the Assistant Collector in their favour. The appeal filed by Rohtan was dismissed on 03.03.1986 (Ex.R3), upholding the said order. In the meantime, the land was acquired on 31.03.1988 by passing of the Award and the petition under Section 30 was filed.

23. The matter was also taken before the Commissioner by Rohtan (appellant-petitioner) who observed that whatever relief the petitioner would get, the same would be incorporated in the revenue record and till such time the issue is adjudicated from the Civil Court, the present entries in the mutation would continue. Resultantly, the revision petition was dismissed on 30.08.1988 (Ex.P13)

24. The Reference Court as noticed has already observed that the adoption of Bhagha is not at all proved and has come to the conclusion that he was appointed as an heir by Jaimal and at the time of his death, he succeeded to the property of Jaimal and, thus, was shown as the adopted son of Jaimal in the revenue record. Relevant observations of the Reference Court reads as under:-

“17. In view of my above discussion, I am of the considered view that in the case in hand, adoption of Bhagha by Jaimal is not at all proved; Bhagha @ Bagh Singh was appointed as an heir by Jaimal at the time of his death; accordingly, he succeeded to the property of Jaimal and according to that he was shown as an adopted son of Jaimal in the revenue records.”

25. The evidence has already been discussed in detail and the said finding has not been assailed by the respondents. For adoption to be

proved, the onus as such was upon the respondents who had taken the plea. It is settled principle that burden of proof of adoption is a heavy one and the evidence produced and the admission made by the respondents themselves would go on to show that there was no valid adoption. Neither any ceremony was conducted and nobody had deposed to prove the essentials of giving and taking and that before the death of Jaimal in 1943, he had adopted Bhagha @ Bagh Singh. Therefore, it cannot be said that the stand of respondent No.1 is correct. It has come on record Bhagha @ Bagh Singh started serving Jaimal 2-3 years before his death and also resided with him. In such circumstances, the stand of the appellant as such is correct that Bhagha @ Bagh Singh was appointed as an heir and resultantly a mutation bearing No.3264 was entered in his favour, which was done on 30.03.1945 (Ex.R4) till his death on 11.09.1982, which had never been contested at any stage. The respondents took the benefit of the said entries to get a mutation in their favour on 15.07.1985 and the revenue authority namely the Commissioner had rightly left the issue open.

26. Section 2 of Punjab Custom (Power to Contest) Act, 1920 reads as under:-

“2. Definitions. In this Act-

“Alienation” includes any testamentary disposition of property.

"Appointment of an heir" includes any adoption made or purporting to be made according to custom.”

27. Para 35, 36, 48, 49, 52, 54 and 55 of Chapter III of

Customary Law of Rattigan's Digest reads as under:-

“35. A sonless proprietor of land in the central and eastern parts of the Punjab may appoint one of his kinsmen to succeed him as his heir.

36. There are no restrictions as regards the age or the degree of relationship of the person to be appointed.

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48. An heir appointed in the manner above described ordinarily does not thereby lose his right to succeed to property in his natural family, as against collaterals, but does not succeed in the presence of his natural brothers.

49. Nor, on the other hand, does the heir acquire a right to succeed to the collateral relatives of the person who appoints him, where no formal adoption has taken place, inasmuch as the relationship established between him and the appointer is a purely personal one.

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52. The appointed heir succeeds to all the rights and interests held or enjoyed by the appointor, and semble would succeed equally with a natural son subsequently born.

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54. On the death of the appointed heir his male issue succeeds, and in default of such issue his widow takes his estate on the usual life interest.

55. In the event of his dying childless, and leaving no widow, the estate which he inherited from the person who appointed or affiliated him passes (1) to his own natural heirs if the estate consists of property over which the appointor had an absolute power of disposal, and (2) to the male collaterals of the appointor's family if the estate consists of property over which the appointor had only a restricted power.”

28. Thus, from the above paragraphs it would be clear that the appointment of a legal heir is a purely personal relationship as such and

the appointee as such does not get involved in being transplanted in the other family. The appointee would have a right to succeed to the property of the natural family. The general rule being that he is not entitled to succeed to his share in his natural father's property in the presence of his natural brothers and he would be excluded by his natural brother.

29. As per para 52, the appointed heir succeeds to all the rights and interests held or enjoyed by the appointor and as per para 55 in the event of his dying childless, his own natural heirs as such would have a right to estate which he inherited from the person who appointed him if he had an absolute power of disposal to the said property. Male collaterals of the appointor's family would only have a right, if the appointor had only a restricted power.

30. The paragraph 55 as such has been used in favour of the respondents in as much as it was held that collaterals would get the benefit being children of Nar Singh uncle of Jaimal. For the said principle to be applied then even children of Ram Rattan who was Jhabbu, would also get the benefit which included Rohtan, who has now put forward his claim on the stand of exclusive right being brother of Bhagha @ Bagh Singh deceased.

31. Section 8 (a) and (b) of the 1956 Act reads as under:-

“8. General rules of succession in the case of males.—The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:—

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule.”

32. The Schedule of Clause II reads as under:-

“II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister.

33. Thus, it would be apparent that on the death of Bhagha, Rohtan would be entitled to his share and the children of Nar Singh along with other collaterals combined would only get the benefit if it has been proved that Bhagha Singh had been adopted by Jaimal, which had not been done.

34. Para 55 as such was subject matter of consideration before the Full Bench in '**Gainda and another Vs. Mt. Jai Devi and another**' **AIR (31) 1944 Lahore 90**. The issue before the Full Bench was that once there had been adoption under the customary law and on the death of the adoptee whether the widow could gift the entire property to her daughter. The said gift had been challenged by the collaterals of the adopted father and the claim had been rejected on the ground that under the Customary Law it would be the self acquired property and the daughter was preferential heir in respect of the same. It was further held that ancestral property in the hands of adopted son, would not revert to the collaterals, but only, if all his descendents whether male or female had died.

35. On an divergent opinion the matter had been referred to the Full Bench. The argument raised was that on the death of appointed heir, who did not have a son the property would revert to the collaterals and

that it would not be permissible to apply the principles applicable in the cases of gifts to a case of succession to an appointed heir. The said argument was rejected by the Full Bench and it was held that in the case of appointment of an heir, the property is self-acquired so far as the descendants of the donee or the appointee is concerned. Reliance was placed upon an earlier Full Bench decision passed in '**Sita Ram Vs. Raja Ram**', 12 PR 1892 to hold that collaterals of the adoptive father would not be entitled to exclude the daughter of the adopted son. Relevant portion of the judgment passed in **Gainda (supra)** reads as under:-

“I am in respectful agreement with the reasons of the learned Judges, and I would, therefore, hold that the agnatic theory cannot be stretched so far as to lay down that the collaterals of the adoptive father would be entitled to exclude the daughter of the adopted son. In the present case the gift by Mt. Jai Devi defendant 1 in favour of her daughter merely amounts to an acceleration of succession. The plaintiffs are, therefore, not entitled to challenge this gift in the presence of the daughter. For the reasons given above, I would affirm the decision of the Courts below and dismiss this appeal with costs.”

36. The distinction as such between customary adoption, the appointment of legal heir, the personal relationship and that of formal adoption under the Hindu Law was noticed by a Division Bench of this Court in '**Gurdev Singh and others Vs. Kehar Singh and others**', 1982 AIR (Punjab) 289. In '**Mohinder Singh Vs. Gurbax Singh**', 2004 (3) PLR 154 also the said issue was discussed. Relevant portion of the said judgment reads as under:-

“20. Under the customary law of Punjab, there was distinction between customary formal adoption and adoption by way of customary appointment of heirs. Under the Hindu law or in case of customary formal adoption, the adoption is primarily a religious act intended to confer spiritual benefit on the adopter, and under the Customary Law in Punjab, adoption was a secular act the object of which was to appoint a legal heir. The formal adoption by customary method confers on the adopted son the status of a son in the adoptive family with a right of collateral succession in the family of the adoptive father. The formal adoption may be made in accordance with custom and by observing the customary forms. It is not necessary to comply with the rules of Hindu law in the matter of ritual or otherwise. In case of customary adoption the adoption was no more than a mere appointment of a legal heir creating a personal relationship between the adoptive father and the appointed heir only. There is no tie of kinship between the appointed heir and the collaterals of the adoptive father. The appointed heir does not acquire the right to succeed collaterally in the adoptive father's family. **He acquires the right to succeed the property which his adoptive father leaves for him at the time of his death.** He has no right to challenge any alienation made by the adoptive father during his life time. The status of the appointed heir is, thus, materially different from that of a son adopted under the Hindu Law or formal adoption under custom.

21. The adoption is formal if the parties manifest a clear intention that there should be a complete change of the family of the adopted son, so that he ceases to be a member of his natural family and loses his right of collateral succession in that family and at the same time becomes a member of the adoptive father's family and acquires a right of collateral succession in the family. This distinction has been clearly recognised by the Hon'ble Supreme Court in **Kehar Singh v. Dewan Singh**,

A.I.R. 1966 S.C. 1555 wherein it was held as under:-

"A customary adoption -in the Punjab is ordinarily no more than a mere appointment of an heir creating a personal relationship between the adoptive father and the appointed heir only, see **Mela Singh v. Gurdas, I.L.R. 3 Lah. 362; A.I.R. 1922 Lah. 433 (F.B.)**. There is no tie of kinship between the appointed heir and the collaterals of the adoptive father. The appointed heir does not acquire the right to succeed collaterally in the adoptive father's family. The status of the appointed heir is thus materially different from that of a son adopted under the Hindu law.

The general custom negating the right of the appointed heir to succeed collaterally in the family of his adoptive father is stated in Article 49 of Rattigan's Digest of Customary Law, 13th Edn. D.572 thus:-

"49. Nor, on the other hand, does the heir acquire a right to succeed to the collateral relatives of the person who appoints him, where no formal adoption has taken place, inasmuch as the relationship established between him and the appointer is a purely personal one."

The rule in Article 49 does not apply to a formal adoption by the customary method. The customary formal adoption completely severs the connection of the adopted son with his natural family and transplants him from his natural family to the adoptive family. Such an adoption confers on the adopted son the right of collateral succession in the adoptive father's family and takes away the right of collateral succession in the natural family. The formal adoption may be made in accordance with custom and by observing the customary forms, and it is not necessary to comply with the rules of Hindu law in the matter of ritual or otherwise. See **Abdur Rehman v. Raghubir Singh, (1949)51 P.L.R. 119, Waryaman v. Kanshi Ram. I.L.R. 3 Lah. 17; (A.I.R. 1922 Lah. 105)**."

Further it was also held in **Mukand Singh v. Wazir Singh, (1972)4 S.C.C. 178** that a Hindu governed by customary law in

Punjab was not disentitled to make a formal adoption according to customary adoption or according to Hindu rites and ceremonies.”

37. Thus, keeping in view the above discussion and the Full Bench judgment in **Gainda (supra)** which was not brought to the notice of the Reference Court, this Court is of the opinion that while placing reliance upon Para 55, the Reference Court was not justified to come to the conclusion that the appellant as such had no absolute legal right. Once on the death of Bhagha @ Bagh Singh succession had opened and therefore, Rohtan as such would have the absolute right to the property of Bhagha @ Bagh Singh his brother who had inherited it from Jaimal. The respondents being collaterals as such had no claim on the property of Jaimal inherited by Bhagha @ Bagh Singh who had been looked after by Bhagha @ Bagh Singh in the evening of his life and for that reason the property had been mutated in his favour. Ex.P9 and P10 also further go on to show that even in the civil litigation preferred by Bhagha @ Bagh Singh he had himself shown as son of Jhabbu and never been shown as son of Jaimal in the judgment and decree of 1974.

38. Resultantly the questions framed in Para No.6 above are answered in favour of the appellant and the appellant is held entitled to the compensation in the hands of Bhagha @ Bagh Singh who further had a right of succession as such being the legal heir of Jaimal.

39. Resultantly, the present appeal is allowed. The Award of the Reference Court dated 06.11.1990 is set aside and it is held that the compensation deposited by the Land Acquisition Collector alongwith

interest shall go to the legal heirs of the deceased appellant.

40. The appeal stands allowed accordingly.

FEBRUARY 11, 2020
Naveen

(G.S. SANDHAWALIA)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether Reportable:	Yes/No